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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/672,097	09/26/2003	Paul Shellum	BLL-0043-C	7087

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EXAMINER

BARNIE, REXFORD N

ART UNIT	PAPER NUMBER
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2643

DATE MAILED: 09/21/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/672,097	SHELLUM ET AL.	
	<b>Examiner</b>	<b>Art Unit</b>	
	REXFORD N BARNIE	2643	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☐ Responsive to communication(s) filed on 14 September 2004.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1-15 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-15 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

*R. Barnie*  
**REXFORD BARNIE**  
**PRIMARY EXAMINER**

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

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**DETAILED ACTION*****Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-15 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-20 of U.S. Patent No. 6,480,749. Although the conflicting claims are not identical, they are not patentably distinct from each other because the claims are directed to the claimed subject matter with minor wording variations.

***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 1-15 are rejected under 35 U.S.C. 102(e) as being anticipated by Lee, Jr. et al. (US Pat# 6,480,749).

The applied reference has a common assignee (Bellsouth Intellectual Property) with the instant application. Based upon the earlier effective U.S. filing date of the reference, it constitutes prior art under 35 U.S.C. 102(e). This rejection under 35 U.S.C. 102(e) might be overcome either by a showing under 37 CFR 1.132 that any invention disclosed but not claimed in the reference was derived from the inventor of this application and is thus not the invention "by another," or by an appropriate showing under 37 CFR 1.131.

Claims 1-5 and 11 are rejected under 35 U.S.C. 102(e) as being anticipated by Pack (US Pat# 6,526,025).

Regarding claim 1, Pack teaches a method for measuring network performance parity comprising of identifying a plurality of ILEC performance measurement for a first transaction and identifying a plurality of CLEC performance measurements for a second transaction based on ILEC and CLEC data respectively in (see figs. And cols. 5-8).

Regarding claims 2-3, Pack teaches taking mean measurements within a common time period.

Regarding claim 4, Pack teaches determining distribution and performance data associated with ILECs and LECs (see figs. And col. 3).

Regarding claim 5, Pack teaches a method for measuring network performance parity comprising of identifying a plurality of ILEC performance measurement for a first transaction and identifying a plurality of CLEC performance measurements for a second

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transaction based on ILEC and CLEC data respectively in (see figs. And cols. 5-8).

Pack teaches comparison between performance data associated with a CLEC and ILEC which for instance can be analyzed and generated in a graph format in (see figs.).

Regarding claim 6, Pack teaches the claimed subject matter in (see cols. 10-12 and cols. 6-8).

Regarding claim 11, Pack teaches a method for measuring network performance parity comprising of identifying a plurality of ILEC performance measurement for a first transaction and identifying a plurality of CLEC performance measurements for a second transaction based on ILEC and CLEC data respectively in (see figs. And cols. 5-8).

Pack teaches comparison between performance data associated with a CLEC and ILEC which for instance can be analyzed and generated in a graph format in (see figs.).

Pack teaches determining if parity exist between a CLEC and an ILEC and taking corrective measures if necessary in (see col. 7 lines 1-25).

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation

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under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 7-10 and 12-14 are rejected under 35 U.S.C. 103(a) as being unpatentable over pack (US Pat# 6,526,025) in view of Eringis et al. (US 2003/0202638 A1).

Regarding claims 7-10, Pack teaches use time factors, measuring efficiency and so forth but fails to teach the claimed subject matter in detail but the examiner takes official notice that it's well known in the art to determine QOS associated with a plurality of service provider for call routing and providing services including bandwidth services, least cost routing, quality of services and so forth.

Eringis teaches a communication system wherein QOS factors can be analyzed and possibly enhanced in (see pages 6 [0056-0058], 8 [0067], 9 [0077], 11 [0094], 23 [0133-0134], 35[0180], 54[0327]-64).

Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to incorporate the teaching of Eringis into that of Pack thus making it possible to analyze data associated with service providers and determine, if any corrective measures should be taken or necessary to avoid revenue loss.

Regarding claims 12-14, The combination including Eringis or pack teaches analyzing enabling a network operator to take corrective measure based on analyze data. The examiner takes official notice that it's notoriously well known to take corrective

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measures including call tariff based on pricing data or incentive offered by competing carriers. Furthermore, billing remedy could be correlated to QOS (quality of services).

Claim 15 is rejected under 35 U.S.C. 103(a) as being unpatentable over Pack (US Pat# 6,526,025) in view of Cox (US pat# 6,011,838).

Regarding claim 15, Pack teaches constantly updating or making changes but fails to teach the claimed subject matter in detail. Cox teaches process and system for dynamically switch traffic during any given time period by using previous month remedy in conjunction with a newly received data and dynamically configuring this information as well in (see disclosure).

Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to incorporate the teaching of Cox into that of Pack thus making it possible to dynamically control network parameters to maximize revenue, avoid loss of revenue and customer complaints associated with quality of service.

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to **REXFORD N BARNIE** whose telephone number is (703)306-2744. The examiner can normally be reached on M-F 9:00-6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, CURTIS KUNTZ can be reached on (703) 305-4708. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

PRIMARY EXAMINER  
REXFORD BARNIE  
09/14/04

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